Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

SCOT L. ZIMMERMAN,

*Petitioner,*

*v.*

STATE OF OREGON DEPARTMENT OF JUSTICE,

*Respondent.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Title II of the Americans With Disabilities Act prohibits discrimination on the basis of disability in the provision of public services, programs, and activities. The Ninth Circuit in this case held that Title II does not reach employment discrimination, expressly rejecting the contrary view of every other court of appeals to address the issue and acknowledging that its "decision creates an inter-circuit split of authority." As three-judges noted in dissenting from the denial of rehearing *en banc*, this is an "important [issue] of national significance" on which "[t]he Ninth Circuit now stands alone" because "the panel's opinion conflicts either directly or indirectly with the position taken by every circuit to confront the question," as well as with "18 of the 21 published district court opinions" and "4 out of 6 unpublished district court decisions."

The question presented is:

Whether Title II of the ADA reaches employment discrimination?

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Scot L. Zimmerman respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The district court's opinion dismissing Petitioner's complaint, App. 1-7, is published at 983 F. Supp. 1327. The Ninth Circuit's opinion (per Graber, J.) affirming, App. 8-35, is published at 170 F.3d 1169. The Ninth Circuit's order denying rehearing *en banc*, accompanied by the dissenting opinion of three judges, App. 36-51, is not yet published.

## JURISDICTION

The Ninth Circuit entered its judgment on March 18, 1999, and denied rehearing *en banc* on July 28, 1999. Petitioner invokes this Court's jurisdiction under 28 USC 1254(1).

## STATEMENT UNDER S. CT. RULE 29.4(B)

Because this proceeding will draw into question the constitutionality of Title II of the Americans With Disabilities Act if Respondent asserts sovereign immunity in this Court, and because neither the United States nor any agency, officer, or employee thereof is a party, Petitioner notes that 28 USC 2403(a) may apply. The constitutionality of Title II was not called into question below and, accordingly, no court of the United States as defined by 28 USC 451 has, pursuant to 28 USC 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress is drawn in question. Petitioner is serving this Petition on the Solicitor General of the United States. *See* S. Ct. R. 29.4(B).

## STATUTORY PROVISION AND REGULATION INVOLVED

Title II of the Americans With Disabilities Act, 42 USC 12132, provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, on the basis of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

The relevant regulation of the Department of Justice, 28 CFR 35.140(a), provides:

> No qualified individual with a disability shall, on the basis of disability, be subjected to discrimination in employment under any service, program, or activity conducted by a public entity.

## STATEMENT OF THE CASE

1. As in Petitioner's complaint, Respondent Oregon Department of Justice hired Petitioner as a child support agent in early 1995. Petitioner, who is visually impaired as a result of a disabling eye condition, requested that Respondent reasonably accommodate his disability. Respondent refused, however, and furthermore retaliated against Petitioner, ultimately terminating him in December 1995. App. 8.

Petitioner subsequently brought this action against Respondent under Titles I and II of the Americans With Disabilities Act ("ADA") and state law. The district court dismissed the complaint under Fed. R. Civ. P. 12(b)(6). Two of Petitioner's claims are not relevant here. The district court dismissed Petitioner's Title I claim for failure to exhaust required administrative remedies. App. 4. The district court dismissed Petitioner's state law claim on the basis of sovereign immunity. *Id.* 7.

Regarding Petitioner's third claim, which is at issue here, the district court held that Title II of the ADA does not reach employment discrimination. App. 6. The court acknowledged that "[t]he Justice Department interprets Title II as prohibiting employment discrimination, while courts addressing the issue are split, with a majority agreeing with the Justice Department." *Id.* 4 (citing 28 CFR 35.140(a)). The court rejected the majority view, however, as "inconsistent with the structure of the ADA as a whole." *Id.* 5. Because Title I of the ADA "create[s] a comprehensive scheme prohibiting employment discrimination," "[a]llowing employment discrimination claims under Title II would make Title I almost completely redundant as applied to public employees." *Id.* In particular, according to the district court, finding that Title II reached employment discrimination would permit claimants to circumvent the administrative exhaustion requirements of Title I. *Id.* 5.

2. Petitioner appealed the dismissal of his Title II claim, supported by the Department of Justice as *amicus curiae*,[1] but the Ninth Circuit affirmed. App. 8. Citing decisions of a number of other circuits and a variety of district courts, the court acknowledged that "most courts have held that Title II applies to employment," *id.* 33-34 & nn.15-19, but concluded that "we simply do not find them persuasive," *id.* 35. *See also id.* ("We realize that our decision creates an inter-circuit split of authority."). Instead, the court concluded that the text of Title II unambiguously does not reach employment discrimination, *id.* 13, and that, "[e]ven were the wording of Title II ambiguous, by itself, the structure of the ADA as a whole unambiguously demonstrates that Congress did not intend for Title II to apply to employment," *id.* 19. Thus, although the Ninth Circuit recognized that the Department of Justice's contrary regulation was issued pursuant to express

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[1] Petitioner is lodging with this Petition the *amicus curiae* brief filed by the Department of Justice.

congressional direction, 42 USC 12134(a), and is entitled to substantial deference under *Chevron, U.S.A.* v. *Natural Resources Defense Council*, 467 US 837 (1984), the court held the regulation invalid. App. 13.

a. Addressing the text of Title II itself, the Ninth Circuit concluded that because "employment by a public entity is not commonly thought of as a 'service, program, or activity of a public entity,'" this clause in the statute applies to only "the 'outputs' of a public agency, not to 'inputs' such as employment." App. 14. The court reasoned that "a Parks Department would answer the question, 'What are the services, programs, and activities of the Parks Department?'" by explaining, "We operate a swimming pool; we lead nature walks; we maintain playgrounds." *Id.* 14-15. The Parks Department would deem employment, by contrast, as "a means to deliver [its] services, programs, and activities." *Id.* 15.

The Ninth Circuit also refused to attribute independent significance to the second clause of Title II, which prohibits "discrimination by any [public] entity." App. 17. The court reasoned that "the placement of the second clause in the single sentence that forms 42 U.S.C. 12132 suggests that the second clause relates back to the same 'services, programs, or activities' of a public entity that the first clause covers." *Id.* Furthermore, an ADA plaintiff may prevail only if he or she is a "qualified individual with a disability," *see* 42 USC 12132, defined as a person who "meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity," *id.* § 12132(2). Thus, according to the Ninth Circuit, "[t]he second clause of § 12132 must relate to a government service, program, or activity; otherwise a plaintiff is not 'qualified' to bring a claim under that clause." App. 18.

b. The Ninth Circuit found its holding buttressed by the structure of the ADA as a whole:

The structure of the ADA demonstrates congressional intent in five main ways:

(1) Congress placed employment-specific provisions in Title I, which it labeled "Employment," whereas Congress placed no employment-related provisions in Title II, which it labeled "Public Services."

(2) Congress defined "qualified individual with a disability" differently in Title I than in Title II. In Title I, a person is "qualified' if the person can work, whereas in Title II a person is "qualified" if the person is eligible to receive services or participate in a publicly provided program.

(3) Allowing employment discrimination claims under Title II would make Title I redundant as applied to public employees and would eviscerate the procedural requirements of Title I for these employees.

(4) Congress gave regulatory authority to different agencies for Title I and Title II. Congress gave authority over Title I to the EEOC, the agency that administers most federal employment-related statutes.

(5) Congress expressly linked the employment related-provisions of the Rehabilitation Act to Title I of the ADA, not to Title II.

App. 19-20; *see generally id.* 19-24.

The Ninth Circuit acknowledged that the Eleventh Circuit, in finding that Title II does reach employment discrimination, had relied on the statute's legislative history, but concluded without further explanation that the "legislative history [is] ambiguous at best." *Id.* 24 n.12.

c. The Ninth Circuit also rejected Petitioner's contention that Title II of the ADA incorporates the prohibition on employment discrimination set forth in the Rehabilitation Act, 29 USC 701 *et seq.* Addressing 42 USC 12133, which expressly incorporates the "remedies, procedures, and rights set

forth in" 29 USC 794(a), the court of appeals concluded that "[t]hat section includes the Rehabilitation Act's *procedural* rights, not its substantive rights." App. 25 (emphasis added). Addressing 42 USC 12134(b), which requires that regulations issued under Title II "be consistent with * * * regulations under" 28 USC Part 41, which in turn prohibit employment discrimination, *see* 28 CFR 41.1 *et seq.*, the court of appeals took the view that the statute requires only "compatib[ility]" between regulations under Title II and the Rehabilitation Act. App. 26.

The Ninth Circuit also refused to find that Title II reaches employment discrimination based on its parallel to section 504 of the Rehabilitation Act, 29 USC 794(b), which this Court has held applies to employment discrimination, *Consolidated Rail Corp.* v. *Darrone*, 465 US 624, 631-34 (1984). At the time of the *Consolidated Rail* decision, Section 504 governed "any program or activity receiving Federal financial assistance," while Title II governs "the services, programs, or activities of a public entity." According to the Ninth Circuit, "[t]he focus" of Section 504 "is the receipt of Federal financial assistance," which "naturally encompasses the entire operation of the program or activity," while "the focus of Title II of the ADA is on the services, programs, or activities that a public entity provides. That is an outward-looking focus." App. 30. Furthermore, the Rehabilitation Act, unlike Title II, contains several provisions relating to employment and no separate title directed at employment discrimination. *Id.* 32.

d. Petitioner's petition for rehearing *en banc* was denied over the extensive dissent of three judges. App. 36-51. Citing voluminous district court and court of appeals authority, the dissent explained that "the panel's opinion conflicts either directly or indirectly with the position taken by every circuit

to confront the question," as well as with eighteen published and four unpublished district court decisions. *Id.* 37 & n.1.[2]

3. This Petition for a Writ of Certiorari followed.

## REASONS FOR GRANTING THE WRIT

Certiorari should be granted because, as the Ninth Circuit itself recognized, the decision below creates an irreconcilable conflict with decisions of other circuits. The Eleventh Circuit, for example, recently has considered in detail the arguments adopted by the Ninth Circuit, rejected them, and denied rehearing *en banc*. *Bledsoe* v. *Palm Beach County Soil & Water Conserv. Dist.*, 133 F.3d 816, *reh'g en banc denied*, 140 F.3d 1044, *and cert. denied*, 119 S. Ct. 72 (1998). Only this Court can resolve the conflict and, because the conflicting positions already are fully ventilated in the lower courts, there is no basis for deferring the question to a later date.

Certiorari also is warranted because the decision below is erroneous. Even under the most charitable reading to Respondent, Title II is ambiguous about its application to employment discrimination. But even accepting such an ambiguity, the courts must defer to the authoritative regulation issued by the Department of Justice at Congress' direction, which specifically encompasses employment discrimination.

Finally, this case is an appropriate vehicle to resolve a separate conflict over whether Title II validly abrogates states' sovereign immunity. Absent such an abrogation, Petitioner cannot prevail against Respondent, which is an arm of the State of Oregon. The *en banc* Eighth Circuit recently held that the Eleventh Amendment bars such claims, expressly rejecting the contrary view of six other circuits. *Alstook* v. *City*

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[2] The dissent noted, App. 37, that the Ninth Circuit itself had applied Title II to an employment claim "without discussion" in *Norman-Bloodsaw* v. *Lawrence Berkeley Laboratory*, 135 F.3d 1260, 1272 (1998), which is of course no longer good law after the panel's opinion in this case.

*of Maumelle*, No. 97-1825, 1999 U.S. App. LEXIS 16945, *13 (July 23, 1999).

1. The decision below consciously "creates an inter-circuit split of authority." App. 35. At least four other circuits have applied Title II to employment claims. *See id.* 37 (dissent from denial of rehearing *en banc*, citing *Bledsoe* v. *Palm Beach County Soil & Water Conserv. Dist.*, *supra*, 133 F.3d 816 (11th Cir. 1998); *Castellano* v. *City of New York*, 142 F.3d 58 (2d Cir. 1998); *Holmes* v. *Texas A & M*, 145 F.3d 681 (5th Cir. 1998); *Doe* v. *University of Md. Med. Sys. Corp.*, 50 F.3d 1261 (4th Cir. 1995)). In particular, the Eleventh Circuit recently considered this question in detail and concluded that Title II reaches employment discrimination. *Bledsoe*, *supra*. The Ninth Circuit in this case, in turn, repeatedly quoted and rejected the Eleventh Circuit's ruling. App. 16, 28, 32, 33. *Bledsoe* is, moreover, embedded precedent given that the Eleventh Circuit, like the Ninth Circuit here, refused to rehear the case *en banc*.

a. The plaintiff in *Bledsoe*, who worked for a state agency in a position that required substantial walking, seriously injured his leg. The agency offered him one alternative position, which he declined, then terminated him. After the district court dismissed the plaintiff's Title II employment discrimination suit, the Eleventh Circuit reversed, "join[ing] several other courts which have held that Title II does encompass employment discrimination." 133 F.3d 816, 820-21 & n.4 (citing *Doe* v. *University of Md. Med. Sys. Corp.*, *supra*, 50 F.3d 1261 (4th Cir.); *Innovative Health Sys.* v. *City of White Plains*, 117 F.3d 37 (2d Cir. 1997); and thirteen district court decisions).

The Eleventh Circuit rejected the view of the district court that the provisions of Title II, "understood as a whole, focus on a public entity's outputs rather than its i[n]puts." 133 F.3d at 821. That view, the court of appeals explained, "ignore[s] the prohibition in the final clause of the section, which protects qualified individuals with a disability from being

'subjected to discrimination by any such entity,' and is not tied directly to the 'services, programs, or activities' of the public entity." *Id.*

The Eleventh Circuit also found that "[e]xtensive legislative commentary regarding the applicability of Title II to employment discrimination" was "so pervasive as to belie any contention that Title II does not apply to employment actions." 133 F.2d at 821. The House Report on the statute, in particular, expressly states that Title II encompasses employment discrimination to the same extent as Title I. H.R. Rep. No. 101-485(III), at 50 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 473 ("H.R. Rep. 485(III); H.R. Rep. No. 101-485(II), at 84 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 367. The legislative history furthermore states that Congress intended Title II to "work in the same manner as Section 504" of the Rehabilitation Act, which prohibits employment discrimination. H.R. Rep. 485(III), 49-50, *reprinted in* 1990 U.S.C.C.A.N. at 472-73.

Even if the statute were ambiguous, the Eleventh Circuit reasoned, deference would be due the regulations of the Department of Justice, which provide that Title II prohibits employment discrimination. 133 F.3d at 822. In particular, the House Report on the statute expressly notes that because, "[u]nlike the other titles in this Act, title II does not list all of the forms of discrimination that the title is intended to prohibit," Congress expressly "direct[ed] the Attorney General to issue regulations setting forth the forms of discrimination prohibited." H.R. Rep. 101-485(III), at 52, *reprinted in* 1990 U.S.C.C.A.N. at 475. Given that the Department's regulations are not "arbitrary, capricious, or manifestly contrary to the statute," the Eleventh Circuit held that they must be enforced under *Chevron, U.S.A.* v. *Natural Resources Defense Council*, *supra*.

b. Only this Court can provide a uniform national interpretation of Title II because, in addition to the circuit split precipitated by the decision below, the Ninth Circuit's hold-

ing conflicts with an extraordinary array of district court authority. The opinion dissenting from the denial of rehearing *en banc*, for example, collects eighteen published and four unpublished district court opinions from eleven circuits that apply Title II to employment discrimination. App. 37-38 n.1. The panel opinion itself acknowledges most of these decisions, many of which contain substantial and detailed analyses of the question. App. 34 nn.15-19. *See, e.g.*, *Downs* v. *Massachusetts Bay Transp. Auth.*, 13 F. Supp. 2d 130 (D. Mass. 1998); *Fobar* v. *City of Dearborn Heights*, 994 F. Supp. 878 (E.D. Mich. 1998); *Saylor* v. *Ridge*, 989 F. Supp. 680 (E.D. Pa. 1998); *Dominguez* v. *City of Council Bluffs*, 974 F. Supp. 732 (S.D. Iowa 1997); *Hernadez* v. *City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997); *Ethridge* v. *State of Ala.*, 847 F. Supp. 903 (M.D. Ala. 1993); *Petersen* v. *University of Wisc. Bd. of Regents*, 818 F. Supp. 1276 (W.D. Wisc. 1993).

The decision below and the numerous decisions holding that Title II applies to employment discrimination fully explore and ventilate the various arguments on either side of the conflict. There is, accordingly, no basis for this Court to defer addressing the question. To the contrary, certiorari should be granted at the earliest possible opportunity so that the decision below does not generate needless litigation over the scope of Title II in pending and subsequently filed cases.

2. Certiorari also is warranted because the decision below is erroneous. We will not recite here all of the errors of the panel opinion, but instead direct the Court's attention to the Eleventh Circuit's decision in *Bledsoe*, *supra*, as well as the extensive dissent from the denial of rehearing *en banc* in this case, App. 36-51. In sum, however, the plain language of the first clause of Title II prohibits discrimination in *all* conduct of public entities in providing "services, programs, or activities." 42 USC 12132. The Ninth Circuit's contrary conclusion, which rests on a "concocted," App. 41 (dissent from the denial of rehearing *en banc*), distinction between public enti-

ties' "inputs" and "outputs," can only "plunge [courts] into the impossible task of categorizing municipal and state functions and activities into two newly created categories * * * with no standards or definitions to guide the entities or parties involved," *id.* 41-42.

Furthermore, the second clause of Title II – prohibiting "discrimination by any [covered] entity" – "plainly and unequivocally prohibits covered entities from engaging in *any* discrimination." App. 43 (dissent from the denial of rehearing *en banc*) (emphasis added). The Ninth Circuit reached the opposite conclusion by reading a *definitional* provision – 42 USC 12131(2) (defining "qualified individual with disability") – to encompass only "services, programs, or activities" of public entities. But this reading renders redundant the second clause of Title II, which can only naturally be read to cover more than the first clause's reference to "services, programs, [and] activities."[3]

The decision below further errs by failing to abide by Congress' directive that Title II is to be applied consistently with the Rehabilitation Act, which this Court has held prohibits employment discrimination. Congress modeled Title II of the ADA after the Rehabilitation Act, employing remarkably similar language in the two statutes. *Compare* 42 USC 12132 *with* 29 USC 794. The decision below skirts past this point and reasons that Congress imported only a "procedural" provision of the Rehabilitation Act. App. 25. But the provision in question expressly applies to "any employee or applicant for employment," 29 USC 794a, making plain that the statute encompasses employment-related decisions.

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[3] Nor does the conclusion that Title II of the ADA applies to employment discrimination render Title I superfluous. Among other things, Title II, unlike Title I, does not apply to private sector employment. *See generally* App. 45-46 (dissent from the denial of rehearing *en banc*) (discussing multiple differences in scope of Titles I and II, including with respect to covered employers, history, and potential remedies).

At most, the arguments mustered by the Ninth Circuit identify ambiguities regarding the scope of Title II. But any such ambiguities have been resolved by the Department of Justice, pursuant to an express direction of Congress, which has issued a regulation providing that Title II encompasses employment discrimination. 42 USC 12134; 28 CFR 35.140. The regulation is entitled to "substantial weight," *Chevron, U.S.A.* v. *Natural Resources Defense Council*, *supra*, 467 US at 844, and when read in combination with the legislative history expressly stating that Title II encompasses employment discrimination, *see supra* at 9, compels the conclusion that the decision below is erroneous.

3. a. Certiorari also is warranted because this case is an appropriate vehicle to resolve a circuit conflict over whether Title II constitutes a valid abrogation of states' sovereign immunity from suit. Until recently, the courts of appeals uniformly had found the abrogation valid, and this Court accordingly has denied certiorari on that question. *E.g.*, *Wilson* v. *Armstrong*, 118 S. Ct. 2340 (1998); *Olmstead* v. *L.C.*, 119 S. Ct. 617, *amended by*, 119 S. Ct. 633 (1998) (order limiting grant of certiorari). More recently, the Court has held the petition for certiorari in No. 98-829, *Florida Department of Corrections* v. *Dickson*, in abeyance, presumably pending the disposition of No. 98-796, *United States* v. *Florida Board of Regents* and No. 98-791, *Kimel* v. *Florida Board of Regents*, *cert. granted on a separate question*, 119 S. Ct. 901 (1999), which address whether the Age Discrimination In Employment Act ("ADEA") constitutes a valid abrogation of state sovereign immunity.

An irreconcilable conflict in the circuits now has emerged, however, as a result of a decision of the *en banc* Eighth Circuit invalidating Title II of the ADA as applied to the states, which expressly rejects the contrary view of six other circuits. *Alstook* v. *City of Maumelle*, No. 97-1825, 1999 U.S. App. LEXIS 16945 (8th Cir. July 23, 1999) (noting conflict with *Amos* v. *Maryland Dep't of Pub. Safety & Corr'l*

*Servs.*, 178 F.3d 212 (4th Cir. 1999); *Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426 (11th Cir. 1998), *cert. granted*, 119 S. Ct. 901, 902 (1999); *Coolbaugh* v. *Louisiana*, 136 F.3d 430 (5th Cir.), *cert. denied*, 119 S. Ct. 58 (1998); *Clark* v. *California*, 123 F.3d 1267 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 2340 (1998); *Crawford* v. *Indiana Dep't of Corrections*, 115 F.3d 481 (7th Cir. 1997)).

b. Certiorari should be granted on the issue of sovereign immunity not only because of the circuit conflict, but also because the Eighth Circuit's ruling in *Alstook* v. *City of Maumelle*, *supra*, is erroneous. In the ADA, Congress specifically abrogated states' Eleventh Amendment immunity. 42 USC 12202 ("A State shall not be immune under the eleventh amendment * * * from an action in Federal or State court of competent jurisdiction for a violation of this Act."). Congress validly exercised its authority under Section 5 of the Fourteenth Amendment in abrogating state sovereign immunity because "there [was] a congruence between the means used and the ends to be achieved," as required by this Court in *City of Boerne* v. *Flores*, 521 US 507, 528 (1997). The ADA is directed toward eliminating the discriminatory treatment of individuals with disabilities, the prevalence of which is amply documented in the statute's legislative history. *See generally Coolbaugh*, *supra*, 136 F.3d at 435. Given such widespread discrimination, the ADA does not provide "remedies so sweeping that they exceed the harms that [the statute is] designed to redress." *Clark*, *supra*, 123 F.3d at 1270. Moreover, given that "individuals with disabilities are a discrete and insular minority," *see* 42 USC 12101(a)(7), the ADA is necessarily limited in scope and accordingly valid. *See Kimel*, *supra*, 139 F.3d at 1433 (recognizing as valid ADA's abrogation of sovereign immunity on the basis of the limited group to whom ADA applies, while invalidating abrogation under ADEA).

c. This Court should grant certiorari to resolve the conflict over the validity of Title II as applied to states rather than

deferring the question. Although this Court's analysis of the ADEA in the *Florida Board of Regents* cases will be instructive regarding that question, they are unlikely to resolve the circuit conflict regarding the ADA. The ADEA and ADA differ substantially in several relevant respects, such that a finding that one statute does or does not constitute a valid waiver of state sovereign immunity likely will not be controlling in all circuits as to the other statute. In particular, the Eleventh Circuit itself in the consolidated ruling that gave rise to the *Florida Board of Regents* and *Dickson* petitions for certiorari invalidated the ADEA as applied to the states while *sustaining* the ADA. *See Kimel* v. *Florida Bd. of Regents*, 139 F.3d 1426, 1433 (1998). Given the substantial uncertainty in this area, the Court should grant certiorari and order expedited briefing so that this issue can be resolved under both the ADA and the ADEA.

Although Respondent did not assert sovereign immunity in the court of appeals, it retains the full right to do so in this Court. *Ford Motor Co.* v. *Department of Treasury*, 323 US 459, 466-67 (1945) ("The Eleventh Amendment declares a policy and sets forth an explicit limitation on federal judicial power of such compelling force that this Court will consider the issue arising under this Amendment in this case even though urged for the first time in this Court."); *see also Edelman* v. *Jordan*, 415 US 651, 677-78 (1978). Lest there be any question, Petitioner expressly disclaims any right to object to Respondent raising sovereign immunity in this Court.[4]

This case is, moreover, the best vehicle to resolve the circuit conflict over whether Title II validly abrogates state sovereign immunity. Only this Petition presents the Court with the opportunity to address both the sovereign immunity ques-

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[4] Because the assertion of sovereign immunity would be consistent with the judgment below, Respondent is apparently not required to do so pursuant to a conditional cross-petition for certiorari, though that may be the safest course. *See* S. Ct. R. 12.

tion and also the important circuit conflict regarding whether Title II reaches employment discrimination.[5] This Court's resources are best utilized by reviewing both issues in a single case, rather than deferring the statutory construction of Title II to yet another case in the following Term.

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[5] If Respondent elects not to assert sovereign immunity, certiorari should be granted to resolve the circuit conflict over whether Title II reaches employment discrimination. That conflict will not be resolved if this Court holds in another case that Title II of the ADA does not validly abrogate state sovereign immunity because other public entities that cannot assert sovereign immunity, such as municipalities, will remain subject to Title II. *E.g.*, *Holbrook* v. *City of Alpharetta*, 112 F.3d 1522 (11th Cir. 1997); *Fobar* v. *City of Dearborn Heights*, 994 F. Supp. 878 (E.D. Mich. 1998); *Dominguez* v. *City of Council Bluffs*, 974 F. Supp. 732 (S.D. Iowa 1997); *Hernadez* v. *City of Hartford*, 959 F. Supp. 125 (D. Conn. 1997); *Bracciale* v. *City of Philadelphia*, Civ. A. No. 97-2464, 1997 U.S. Dist LEXIS 16757 (E.D. Pa. Oct. 29, 1997); *Motto* v. *City of Union City*, Civ. A. No. 95-5678, 1997 U.S. Dist LEXIS 23401 (D.N.J. Aug. 27, 1997); *Winfrey* v. *City of Chicago*, 957 F. Supp. 1014 (N.D. Ill. 1997); *Silk* v. *City of Chicago*, No. 95 C 0143, 1996 U.S. Dist. LEXIS 8334 (N.D. Ill. June 6, 1996); *Lundstedt* v. *City of Miami*, No. 93-1402-CIV-Marcus, 1995 U.S. Dist. LEXIS 21884 (S.D. Fla. Oct. 11, 1995); *Doe* v. *County of Milwaukee*, 871 F. Supp. 1072 (E.D. Wisc. 1995); *Dertz* v. *City of Chicago*, 912 F. Supp. 319 (N.D. Ill. 1995).

## CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and, if Respondent asserts sovereign immunity, the Court should direct the parties to brief whether Congress has validly abrogated states' sovereign immunity from suit under Title II of the Americans With Disabilities Act.

Respectfully submitted,

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